UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NATIONAL NURSES ORGANIZING
COMMITTEE-TEXAS/NNU,
Respondent,

and Case 16-CB-225123

ESTHER MARISSA ZAMORA,
Employee-Charging Party.

CHARGING PARTY'S ANSWERING BRIEF IN OPPOSITION TO THE AFL-CIO'S AMICUS BRIEF

Pursuant to NLRB Rules & Regulations Section 102.46(i)(4), Charging Party Esther Marissa Zamora ("Ms. Zamora") files this Answering Brief in Opposition to the AFL-CIO's Amicus Brief. On December 21, 2020, the Board accepted the AFL-CIO's Amicus Brief, and set January 4, 2021 as the due date for Answering Briefs.

Ms. Zamora will respond to the AFL-CIO's arguments in the order they were made. However, Ms. Zamora notes at the outset that pages 1-3 of the Amicus Brief simply rehash the ALJ's ruling and repeat arguments on the evidence and the merits that Respondent NNOC made. Such repetitive arguments do not assist the Board or the parties.

1. The Board *Can* Use This Case to Promulgate or Reiterate a Policy That Protects Represented Employees Under the DFR

As an initial matter, the AFL-CIO criticizes the General Counsel and Ms. Zamora for seeking to cover neutrality agreements within unions' disclosure obligations without defining the term "neutrality agreement." (AFL-CIO Brief at 7-8). This argument is pure gamesmanship. While it is true that neutrality agreements differ from one to the other (just

as a CBA in one unit differs from a CBA in another unit), the AFL-CIO knows well that *all* neutrality agreements have a common theme and purpose: they are enforceable contracts designed to limit employer opposition to unionization and ease the union's path to representation. This is often (but not always) done through card check and voluntary recognition without an NLRB-supervised secret ballot election. The AFL-CIO's Amicus Brief at 13 specifically recognizes that neutrality agreements' objective is to ensure that the "employer does not oppose representation." Ms. Zamora's Exceptions Brief at page 1 n. 2 also refers to the common attributes, but differing nomenclature, of many such neutrality arrangements. Thus, while a given neutrality agreement may differ from other agreements in innumerable ways, the Board and every labor practitioner "knows them when we see them." This is no different from run-of-the-mill CBAs, which also differ in their terms but are still enforceable contracts that must be disclosed to represented employees. *See, e.g.*, *Law Enf't & Sec. Officers Local 40B (S. Jersey Detective Agency)*, 260 NLRB 419 (1982).

Next, the AFL-CIO argues that the Board must proceed by rulemaking under the Administrative Procedure Act ("APA"), 5 U.S.C. § 1001 et seq., if it wishes to issue a general policy about employees' right to examine any neutrality agreements to which their exclusive representative agreed. (AFL-CIO Brief 2–5). This is wrong for three reasons.

First, the Board need not adopt a new "rule" here to clarify that the NLRA's duty of fair representation ("DFR")—a statutory interpretation recognized by the Supreme Court and the Board for decades—mandates that employees have a presumptive right to see all contracts, including neutrality agreements, their union has made with their employer. In

ruling for Ms. Zamora here, the Board would not be making a new "rule" under the APA or any other statute—it would be issuing an order clarifying what *the duty of fair representation* requires, and what that duty has always required: that an employee-principal has a presumptive right to see the contracts her union-agent has entered into with her employer. Such a clarifying order does not require notice-and-comment rulemaking under the APA. *Cf.*, *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 501 (4th Cir. 2016) (noting that the Board's clarification of an evidentiary burden under Board precedent does not require notice-and-comment rulemaking). Indeed, the Board would simply be using its quasi-judicial power in an adjudication—a power Congress directly delegated to the Board in NLRA Section 10—to announce what is required of NNOC under the long-existing duty of fair representation.

Second, the AFL-CIO's attempt to reframe the General Counsel and Ms. Zamora's argument—to make it seem they are asking the Board to adopt "a rule" requiring notice-and-comment "rulemaking" under the APA—misses the mark. The APA defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. § 551(4) (emphasis added); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1988) (Scalia, J., concurring) (citing the APA definition). This language makes it clear that a "rule" requiring notice-and-comment rulemaking under the APA "is a statement that has legal consequences *only for the future*." *Bowen*, 488 U.S. at 217 (emphasis added). A

"rulemaking" is defined as an "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5).

Here, the General Counsel and Ms. Zamora argue that NNOC has a fiduciary duty to provide her with the neutrality agreement at issue *in this case*. (Ms. Zamora's Exceptions Brief at 10-15). That neutrality agreement is encompassed within NNOC's broader presumptive duty to provide represented employees with all contracts it negotiates with their employer. A Board decision recognizing NNOC's presumptive duty to disclose its contract with HCA will thus affect Ms. Zamora's rights here and now—it would require the Board to apply the presumption to Ms. Zamora's current information request and would not have only a "future effect." *See Attorney General's Manual on the Administrative Procedure Act* 14–15 (1947) (noting adjudications deal with "the determination of past and present rights and liabilities" and "involve the determination of . . . right[s] to benefits under existing law[.]"). The Board's adjudication here will determine what the DFR requires and will "have a bearing" on Ms. Zamora's rights in this case. In short, the Board will not be making a "rule" under the APA requiring notice-and-comment rulemaking if it rules in Ms. Zamora's favor.[1]

[1] The AFL-CIO's argument that the "Board cannot, in adjudicating this specific case, promulgate a broad rule relating to all agreements between unions and employers or even all neutrality agreements between union[s] and employers," (AFL-CIO Brief 2–3), is question begging. Policies announced in adjudications, though not "rules" under the APA requiring notice-and-comment rulemaking, do constitute Board "precedent" that will affect both the immediate case and future adjudications. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765–66 (1969) ("Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies . . . They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of stare decisis in the administrative process, they may serve as precedents."). For example, in *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017), the Board used a single adjudication to announce broad policies that effect countless cases, past and future. *See, e.g.*, *BMW*

Third, even if the Board does announce a new "rule" here, the APA does not require notice-and-comment rulemaking to do so. The AFL-CIO's argument to the contrary defies decades of Supreme Court precedent and black-letter administrative law. It is "plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *see also Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) ("Most norms that emerge from a rulemaking are equally capable of emerging (legitimately) from an adjudication and accordingly agencies have 'very broad discretion whether to proceed by way of adjudication or rulemaking.") (citations omitted); *Nestle Dreyer's*, 821 F.3d at 501 ("[T]he Board is not precluded from announcing new principles in an adjudicative proceeding....") (citation omitted); 32 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure Judicial Review* § 8123 (1st ed. 2020) (Westlaw database updated Oct. 2020) ("The law clearly establishes that an agency may choose to define the law or policy through adjudication even if it has rulemaking authority.").

2. The Board *Should* Use This Case to Promulgate Broad Principles to Protect Represented Employees

As shown above, the Board *can* use this case to announce a broad standard for employee information requests concerning their union's contractual agreements with their employer, and it *should* do so.

Manufacturing Co., 370 NLRB No. 56 (Dec. 10, 2020), which concerns an application of the *Boeing* standard.

The duty of fair representation unions owe to all represented employees is akin to a *fiduciary* duty trustees owes their beneficiaries. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Teamsters Local No. 391 v. Terry*, 494 U.S. 558, 569 (1990) ("the duty of fair representation issue is analogous to a claim against a trustee for breach of fiduciary duty"); *Air Line Pilots v. O'Neill*, 499 U.S. 65, 74-75 (1991). (*See* Ms. Zamora's Exceptions Brief at 10-13). Yet the AFL-CIO, the nation's largest labor federation, is silent about this fiduciary duty. In fact, the AFL-CIO's arguments are an ill-disguised effort to gut all fiduciary and disclosure obligations its constituent unions owe to the employees they purport to represent.

Seeking to put some teeth into NNOC's fiduciary obligations, Ms. Zamora has asked the Board to recognize that the duty of fair representation makes employees *presumptively entitled* to all agreements their union makes (or has made) with their respective employers. (Ms. Zamora's Exceptions Brief at 13). This clarification of DFR law is needed because it is not uncommon for unions and employers to enter into secret contractual agreements that compromise employees' interests. *See, e.g.*, *Merk v. Jewel Food Stores Div. of Jewel Cos.*, 945 F.2d 889 (7th Cir. 1991) (secret agreements violate federal labor policy); *Aguinaga v. United Food & Com. Workers*, 993 F.2d 1463 (10th Cir. 1993) (condemning a secret agreement between union and employer); *Lewis v. Tuscan Dairy Farms, Inc.*, 25 F.3d 1138 (2d Cir. 1984) (union breached its duty of fair representation by making secret agreement with employer not to enforce seniority rights of employees). Compromising employees' rights in quid-pro-quo union and employer contracts is a fact of life under many secret agreements, something the AFL-CIO simply refuses to address. This is especially true for many common provisions of neutrality

agreements, such as preferential union access or the handing over of employee lists and private contact information. See General Counsel Memo 20-13, *Guidance Memorandum on Employer Assistance in Union Organizing* (Sept. 4, 2020); *Mulhall v. Unite Here Local 355*, 667 F.3d 1211 (11th Cir. 2012).[2]

Contrary to the AFL-CIO's arguments, Ms. Zamora has never argued for a per se right of employees to see *all* union contractual agreements with *any* employer. Instead, she seeks a *presumption* that such contracts with *her* employer must be disclosed upon request, but with unions still being able to argue for the existence of some legitimate privacy privilege or other legally acceptable rationale to shield agreements from disclosure to bargaining unit employees, e.g., an individual employee's privacy interests related to her confidential settlement of a disciplinary grievance. (*See* Ms. Zamora's Exceptions Brief at 13). While union fiduciaries *might* be able to articulate some conceivable interest in withholding *some* agreements, the better policy is to make all contractual documents *presumptively* available to bargaining unit employees unless the union proves a legitimate and critical countervailing interest in secrecy. As former Member Brame said long ago, "unions exist at the pleasure of the employees they represent. Unions *represent* employees; employees do not exist to ensure the survival or success of unions." *MGM Grand Hotel, Inc.*, 329 NLRB 464, 475 (1999) (Member Brame, dissenting). In other words, the

[2] The AFL-CIO criticizes the General Counsel's complaint because "the Board does not even know the terms of the alleged agreement at issue in this case…" (AFL-CIO Brief at 8). With no apparent sense of irony, the AFL-CIO ignores the fact that *both* NNOC and the employer, HCA, successfully resisted multiple subpoenas that would have uncovered precisely what was in their still-secret agreement.

principal—the employees—should have a presumptive right to know what secret deals their fiduciary agent is signing or has signed with their employer.

The AFL-CIO concedes that unions have no blanket right to keep all contractual and neutrality agreements secret, recognizing that it may be irrational and wrong in some situations for a union to assert such privacy or confidentiality interests in the face of a represented employee's information request. (AFL-CIO Brief at 13, emphasis added, stating that "A union's agreement to keep a neutrality agreement confidential and its subsequent honoring of that agreement is certainly not irrational *in every instance*.").[3] Yet the AFL-CIO argues that the Board would be unwise to set standards in this case to govern this somewhat unexplored area of DFR law. While the status quo of presumptive non-disclosure of neutrality agreements may work for the AFL-CIO and its constituent unions, it does not work for the employees whose rights are trampled in secret union-employer deals. *See, e.g.*, *Montague v. NLRB*, 698 F.3d 307, 309 (6th Cir. 2012) (neutrality agreement contained post-organizing "provisions related to health care benefits and future collective-bargaining agreements [] that are subject to further negotiation"); *Mulhall, supra*.

In short, this is an appropriate case for the Board to clarify that the duty of fair representation includes a presumption of disclosure whenever employees seek a copy of any secret agreements their union signed with their employer.

[3] The AFL-CIO's citation to the Board's denial of summary judgment in *Baylor University Medical Center*, No. 16-CA-195335 (Dec. 27, 2017) is particularly inapposite, as that case dealt with an employer's offer of a confidential severance agreement to a lawfully discharged employee, a factual situation far afield from the current situation with NNOC.

3. The Negotiation of a Neutrality Agreement Does *Not* Fall Outside the Duty of Fair Representation

The AFL-CIO argues that no duty of fair representation attaches to neutrality agreements because they are negotiated with the employer *before* the union manages to achieve exclusive representative status. This is wrong for several reasons.[4]

First, not all neutrality agreements are signed *before* employees are unionized. It is common that an already-recognized union will seek a neutrality agreement covering the organizing of other, future employees of the same employer. *See, e.g.*, *Pall Corp. v. NLRB*, 275 F.3d 116 (D.C. Cir. 2002) (union demand to enforce a card check recognition agreement over a future expansion of the bargaining unit is not a mandatory subject of bargaining). And it is also likely that the union might offer concessions to that employer to help corral those future employees. "Employers and unions may set ground rules for an organizing campaign, even if the employer and union benefit from the agreement. But innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." *Mulhall*, 667 F.3d at 1215.

Second, the strictures of federal labor law cover not just unions that already represent employees, but those that "seek[] to represent" employees. *See, e.g.*, NLRA Section 302, 29 U.S.C. § 186(a)(2). Since the entire point of a neutrality agreement is to

[4] Ms. Zamora notes with irony that the AFL-CIO criticizes the General Counsel for not defining with precision what is encompassed by the term "neutrality agreement," yet it seems to know in Section 3 of its brief exactly what is in such agreements and what is meant by the term "neutrality agreement."

quell any employer opposition, possibly avoid NLRB secret ballot elections, and generally ease the path of a union that "seeks to represent" employees, it would be strange to say that such "seeking" unions owe no duties to the employees they covet.[5]

For example, if an organizing union secretly agreed to limit employees' future wage demands in exchange for an employer's under-the-table cash payment and other pre-recognition organizing assistance, would anyone believe such a deal was legal under either NLRA Section 302 or the duty of fair representation? Surely it would be no defense to a DFR lawsuit for a union to first pocket the corrupt cash and then argue it owed no duty to the employees since it was not yet their Section 9(a) representative. "Both section 302 of the LMRA and section 8 of the NLRA may make similar conduct unlawful, but each provides an independent remedy. Section 8 is a general provision. In section 302 Congress has independently provided a judicial remedy for certain specifically described conduct." *Hospital Employees' Div. of Local 79, SEIU v. Mercy-Memorial Hosp*., 862 F.2d 606, 608 (6th Cir. 1988), *further proceedings*, 492 U.S. 914 (1989) (judgment vacated on other grounds). Thus, the NLRA and the duty of fair representation should be read in harmony with Section 302, which covers unions that "seek to represent" employees, especially with regard to conduct the General Counsel determines to violate the NLRA.

[5] As originally enacted, Section 302 applied only to unions that were already the "representative" of the "employees" at issue. *See Arroyo* v. *United States*, 359 U.S. 419, 423 (1959). In 1959, however, Congress amended the provision in the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), 73 Stat. 519, to apply to union organizing activities. The amendment extended the prohibition against receiving "thing[s] of value" to any union that "*seeks to represent* . . . any of the employees of such employer." 29 U.S.C. § 186(a)(2) (emphasis added).

Third, even though the NNOC-HCA neutrality agreement may have been struck long ago before the union gained exclusive representation rights in Corpus Christi, the complaint alleges that HCA and NNOC are applying that agreement *now*, to limit the ways Ms. Zamora can campaign for decertification. Thus, even if the agreement was created long ago when the union was not yet Ms. Zamora's exclusive bargaining representative and ostensibly owed her no duty of fair representation at that time, NNOC is the exclusive representative *now* and its neutrality agreement continues to affect her workplace rights to this day. There is thus no reason to shield that agreement from disclosure when requested by a currently-represented and adversely affected employee.

Fourth, the cases cited by the AFL-CIO are distinguishable. For example, *Simo v. UNITE Sw. Dist. Council*, 322 F.3d 602 (9th Cir. 2003), dealt with employee efforts to examine a contract the union had made with a different employer. The Ninth Circuit stated that no cited cases support "the idea that union members have a right to any information from their union that may affect them, *such as a CBA with a different employer*, when the union is not acting as the exclusive bargaining representative of the workers." *Id*. at 615 (emphasis added). Here, Ms. Zamora is seeking a secret agreement between *her* exclusive bargaining representative and *her* employer. Similarly, *Local Union 370, United Bhd. of Carpenters & Joiners*, 332 NLRB 174, 175 (2000), stands for the unremarkable proposition that "no duty of fair representation attached to the Respondent's operation of its nonexclusive hiring hall," precisely because that non-exclusive hiring hall exists outside any contractual relationship with the employer. But here, as noted, Ms. Zamora is seeking

a secret agreement between *her* exclusive bargaining representative and *her* employer. Thus, NNOC owes her a complete duty of fair representation with regard to that agreement.

4. There Can Be a Breach of the DFR When a Union Fails to Disclose a Neutrality Agreement

First, the AFL-CIO creates a strawman by arguing that "*every* refusal to disclose such an agreement cannot possibly violate the duty [of fair representation] as both the General Counsel and Charging Party propose." (AFL-CIO Amicus Brief at 12). But Ms. Zamora is not arguing that *every* refusal to provide a neutrality agreement or other contract violates the DFR. Rather, as discussed above, she simply seeks a *presumption* under the DFR that such agreements must be disclosed, with the union shouldering the burden of arguing for an exemption if it possesses any legitimate privacy interest.

Second, the AFL-CIO cites the usual language about unions possessing "wide latitude" to balance, denigrate or ignore individual employees' interests under the duty of fair representation, but that "wide latitude" often deals with situations of competing claims by different groups of employees. *See, e.g.*, *ALPA v. O'Neill*, 499 U.S. 65 (1991); *Bishop v. ALPA*, 900 F.3d 388 (7th Cir. 2018) (a union did not act in bad faith in its allocation of retroactive pay between different classes of pilots). Such cases, about balancing the interests of competing groups of employees within the unit, have no application here where one employee, Ms. Zamora, has shown that her ability to campaign for decertification under NLRA Sections 7 and 9 was harmed by the terms of a secret and continuing HCA-NNOC agreement. That is more than enough to warrant disclosure, no matter the "wide latitude" give to unions in other non-analogous circumstances.

5. Existing Precedent Concerning Unions' Duty to Provide Information to Represented Employees is *Not* Inapposite

The AFL-CIO recognizes the many scenarios in which unions are required to turn over contracts and other material to represented employees (AFL-CIO Amicus Brief at 14-15), but says none of those cases apply because neutrality agreements are different and "do not govern or touch on employees' employment." (*Id*. at 15). Of course, nothing could be further from the truth, as shown by the facts here. Ms. Zamora's ability to campaign in her hospital against the NNOC was directly affected by the secret and continuing NNOC-HCA agreement, which those parties are so assiduously hiding. Indeed, Ms. Zamora had more than a "reasonable belief" she was being treated unfairly and discriminatorily by HCA as she tried to campaign in the hospital against NNOC. Her ability to post flyers was curtailed when HCA refused to protect those flyers from being torn down by NNOC agents. (*See* Jt. Ex. 8a, NNOC's settlement agreement). All of this more than "touches on her employment" and supports her information request in this case.

Finally, there is (or should be) a "presumption … that the [employee] acts in good faith when [she] requests information from a[] [union] until the contrary is shown." *Murray American Energy, Inc*., 370 NLRB No. 55 at *6 (Dec. 15, 2020), citing *International Paper Co.*, 319 NLRB 1253, 1266 (1995). Thus, under existing precedent like *IATSE Local 720 (Global Experience Specialists)*, 369 NLRB No. 34 and n.3 (Feb. 28, 2020), the Board has a clear and sufficient basis for accepting the positions of both the General Counsel and Ms. Zamora as she struggles to protect her rights.

6. NNOC Must Provide the Requested Information Because These are Not Extra-unit Matters

According to the AFL-CIO, the NNOC had no obligation to respond to Ms. Zamora's information request because "the Board has long held that unions do not have a right to information about employees outside the unit they represent absent a specific showing of relevance. *See, e.g., Shoppers Food Warehouse Corp*., 315 NLRB 258, 259 (1994). . . . *Bohemia, Inc*., 272 NLRB 1128, 1129 (1984)." But the AFL-CIO is mixing apples and oranges with this argument, as Ms. Zamora was not requesting any extra-unit information, or any information about the rights of *other* employees. To the contrary, she asked for any NNOC neutrality agreement with *her* employer that covered *herself* and her bargaining unit, which she was told by HCA representative Michael Lamond both existed *and* affected how HCA could respond to her decertification efforts. This is not "extra-unit" material.

7. The General Counsel's Position is Not Inconsistent with Any Other Duties Unions Owe

The AFL-CIO cites *Tegna, Inc.*, 367 NLRB No. 71 (Jan. 17, 2019), and argues that Ms. Zamora's information request was complied with and was moot once NNOC denied the existence of any responsive documents. In other words, the AFL-CIO suggests that NNOC is entitled to an essentially irrebuttable presumption that its representations are true, and the Board and Ms. Zamora are required to accept those representations at face value. This is wrong. *Tegna* stands for the unremarkable proposition that "an employer is not obligated to provide information in response to a union's information request if that information does not exist." *Id.* at *5. There was no evidence in *Tegna* that the requested

documents actually existed. Here, to the contrary, HCA *admitted* that the requested neutrality agreement existed (*see* G.C. Ex. 7) at the same time NNOC was parsing words and telling Ms. Zamora it had no documents responsive to her information request. (Jt. Ex. 4). In fact, the General Counsel has alleged and shown that NNOC provided Ms. Zamora with an evasive and bad faith response to her information request. In short, if NNOC was in fact hiding an agreement and acting in bad faith, its denials are false and entitled to no weight.

8. Ms. Zamora's Information Request was Not Used as a Fishing Expedition for Evidence of an Unfair Labor Practice

The AFL-CIO's critique of the General Counsel's and Ms. Zamora's positions misses the mark. Ms. Zamora is not arguing that even irrelevant documents regarding extraneous units are subject to an employee's information request. Instead, she asserts that neutrality agreements *are* relevant and must be produced when, as here, they apply to the existing bargaining unit and affect employees' past, current or future terms and conditions of employment. This is little different than the rule that has long been applied to information requests for, *inter alia*, collective bargaining agreements and grievance documents. *Law Enf't & Sec. Officers Local 40B (S. Jersey Detective Agency)*, 260 NLRB 419 (1982); *Branch 529, Nat'l Ass'n of Letter Carriers*, 319 NLRB 879, 881-82 (1995) (union breached its duty of fair representation by refusing to provide employee copies of her grievance forms); *Vanguard Tours, Inc.*, 300 NLRB 250, 265 (1990) (union violated NLRA Section 8(b)(1)(A) when union steward withheld the collective-bargaining

agreement from unit employees). Asking for one contract between NNOC and HCA that affected Ms. Zamora's working life is not a "fishing expedition."

9. Neutrality Agreements Often Contain Terms Inconsistent With a Union's Duty of Fair Representation

The AFL-CIO broadly defends all neutrality agreements, and perhaps some individual provisions of those agreements may be lawful. On the other hand, many common neutrality agreement provisions may well be unlawful, as they tilt the scales for unionization in ways that would not be permitted if the same employees were trying to de-unionize (decertify). *See, e.g.*, General Counsel Memo 20-13, *Guidance Memorandum on Employer Assistance in Union Organizing* at 3-9 (Sept. 4, 2020), and cases cited *infra*.

For example, while Board elections may not be the *only* method of determining employees' representational preferences, they are the preferred method. It is therefore sophistry for the AFL-CIO to claim that neutrality agreements culminating in "card check recognition" are preferred under the NLRA, as they are not. *See, e.g.*, *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 603 (1969) (finding that recognition based on authorization cards is "admittedly inferior to the election process."); *see also Dana Corp.*, 351 NLRB 434, 438-39 (2007); Final Rule, *Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships*, 85 FR 18366 (July 31, 2020). Similarly, pre-bargaining substantive terms of employment, which is common in many neutrality agreements, is likely unlawful. *Majestic Weaving Co.*, 147 NLRB 859 (1964); *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961).

As General Counsel Memo 20-13 points out, "It undermines the majoritarian principles underlying the Act for a union and employer to agree to substantive terms and conditions of employment prior to executing a voluntary recognition agreement—even if the parties may see some benefit in doing so." (*Id*. at 8). Similarly, many common neutrality agreement provisions like preferred union access to property and binding arbitration of first contracts may also violate NLRA Section 8(a)(2). (*Id*. at 10-12).

CONCLUSION

The AFL-CIO's arguments do not alter what the Board needs to do to justly adjudicate this case. The General Counsel's Amended Complaint is meritorious in all respects, and the Board should find that NNOC violated the Act precisely as alleged. The General Counsel's exceptions and Ms. Zamora's exceptions should be granted, and the ALJ reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2021, a true and correct copy of the foregoing Answering Brief was filed with the NLRB Executive Secretary using the NLRB e-filing system, and was also served via e-mail on that same date to:

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